THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2005-0610, Insurance Commissioner as Liquidator of the Home Insurance Company v. Utica Mutual Insurance Company, the court on August 10, 2006, issued the following order:

The defendant, Utica Mutual Insurance Company (Utica), appeals the trial court's order denying its cross-motion for summary judgment and granting the summary judgment motion filed by the plaintiff, Roger A. Sevigny, Insurance Commissioner, as Liquidator of the Home Insurance Company (The Home). We reverse and remand.

The parties agree that Connecticut substantive law applies to the instant dispute. We apply our own procedural rules to review the trial court's summary judgment ruling. See Keeton v. Hustler Magazine, Inc., 131 N.H. 6, 12 (1988) ("Both State and federal choice of law requirements traditionally apply only to the forum's choice among substantive rules."). In reviewing the trial court's summary judgment ruling, we must consider the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party. D'Amour v. Amica Mut. Ins. Co., 153 N.H. 170, 171 (2005). Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id. We review the trial court's application of the law to the facts de novo. Pennichuck Corp. v. City of Nashua, 152 N.H. 729, 735 (2005).

Utica argues that the trial court erred when it ruled, as a matter of law, that John Lichtman, the principal of Lichtman Associates, Inc., did not materially breach the cooperation clause in the errors and omissions insurance policy Utica furnished him. This clause provides as follows:

> It is a condition precedent to the application of the insurance afforded you herein that you shall:
>
> . . . .
>
> e. Not voluntarily assume or admit liability nor, without our prior written consent, settle any claim or incur any expense, except at the insured's own cost.

The trial court found that an April 30, 1992 letter, which Lichtman signed without obtaining the consent of The Home or of Utica, did not constitute a breach of this provision. In the April 30, 1992 letter, Lichtman agreed to indemnify Premier Roofing Company (Premier) for all "claims, actions, liabilities,

losses, costs and expenses" arising out of claims against Premier that exceeded $100,000 but were less than $250,000. He also admitted that he and Premier had originally agreed that he would furnish insurance policies to Premier that had $100,000 loss limits, but that, instead, he furnished policies with $250,000 loss limits.

Under Connecticut law, "absent estoppel, waiver or other excuse, the substantial or material breach of the cooperation provisions of the insurance policy by an insured puts an end to the insurer's obligation." Brown v. Employer's Reinsurance Corp., 539 A.2d 138, 142 (Conn. 1988). Once the insurer raises violation of the cooperation clause as an issue, the insured (or, in this case, The Home, which stood in place of the insured) must prove compliance with the clause (or estoppel or waiver or other excuse). See O'Leary v. Lumbermen's Mut. Casualty Co., 420 A.2d 888, 891 (Conn. 1979). The insured must also show that, if there has been a breach, it has not caused the insurer to suffer prejudice. Taricani v. Nationwide Mutual Ins. Co., 822 A.2d 341, 345-47 (Conn. App. Ct. 2003).

"[T]he condition of cooperation with an insurer is not broken by a failure of the insured in an immaterial or unsubstantial matter." Arton v. Liberty Mutual Insurance Company, 302 A.2d 284, 288 (Conn. 1972). "The issue of whether there was a lack of cooperation cannot be decided by determining whether there was abstract conformity to ideal conduct on the part of the insured. It is a pragmatic question to be determined in the light of the particular facts and circumstances brought out in the particular case." O'Leary, 420 A.2d at 891-92.

The purpose of a cooperation clause is to protect the insurer's interests. Arton, 302 A.2d at 288. "If insurers could not contract for fair treatment and helpful cooperation from the insured, they would at the very least, be severely handicapped in determining how and whether to contest the claim, and might, in addition, be particularly susceptible to possible collusion between the participants in the [incident]." Id. As a leading insurance law treatise notes: "The main purpose of a cooperation clause is to prevent collusion while making it possible for the insurer to make a proper investigation. In addition, the purpose of a cooperation clause is to enable the insurer to obtain relevant information concerning the loss while the information is fresh, to enable it to decide upon its obligations, and to protect itself from fraudulent and false claims." 14 L. Russ & T. Segalla, Couch on Insurance 3d § 199:4 (2005).

Here, the trial court erred when it ruled that the April 30, 1992 letter, which Lichtman signed, did not, as a matter of law, violate the cooperation clause because, in it, Lichtman did not "assume or admit liability to The Home" or "seek to settle any claim as to The Home." It is immaterial that The Home was not a party to the letter. Lichtman's admission that he and Premier had

originally agreed upon $100,000 loss limit policies constituted an admission of liability. See 4 R. Long, The Law of Liability Insurance §14.01, at 14-6 (2006).

The essence of The Home's claim against Lichtman was that he (or his associate, for whom he was responsible) sold Premier policies with $100,000 loss limits, even though The Home had authorized him only to sell policies with higher loss limits. As one of The Home's witnesses at the arbitration testified:

> Q. Did there come a time when The Home was informed by its insured [Premier] that there was a problem with these programs?
> A. Yes.
> Q. And what was the nature of the problem?
> A. The problem was that the insured claimed that Home's agent sold them a program different from the program that Home quoted to the agent. So, effectively, they said that they were sold a program with $100,000 loss limit for both years under question, while The Home quoted a different program. The first one was 150 and the second was 250.

By admitting that he (or his associate) and Premier had originally agreed to insurance policies with $100,000 loss limits, Lichtman admitted engaging in the negligence of which The Home accused him. Such an admission of liability could have detrimentally affected Utica's ability to defend against The Home's indemnification claim. See id. Indeed, at the arbitration, witnesses for The Home explained that the only reason that The Home agreed to rewrite Premier's policies was because Premier used the April 30, 1992 letter to convince The Home that Lichtman (or his associate) had originally sold Premier policies with $100,000 loss limits. As one witness testified:

> Q. Did the insured [Premier] offer to The Home any documentation to support its assertion?
> A. The insured produced to The Home a letter signed by Lichtman.
> . . . .
> Q. This document, this letter is dated April 30th, 1992, correct?
> A. Correct.

Another witness similarly testified:

> Q. Why didn't [The Home] charge an additional premium [to Premier for the rewritten policies]?
> A. Because - -
> Q. Nonsubject premium that is?
> A. Because the insured showed us evidence at the time

that they were sold a program with $100,000 loss limit for the retro.

. . . .

Q. Did The Home sell such a program?

A. No. The Home didn't sell such a program.

By signing the April 30, 1992 letter, Lichtman therefore breached the policy's cooperation clause. Accordingly, we reverse the trial court's contrary determination. We remand for further proceedings consistent with this order.

We express no opinion as to whether this breach was substantial and material. Nor do we express any opinion as to whether the breach caused the defendant to suffer prejudice. We leave resolution of these issues to the trial court in the first instance.

Reversed and remanded.

DALIANIS, DUGGAN and GALWAY, JJ., concurred.